in Toms River, New Jersey since 1991. Coast was awarded the Volkswagen and Audi dealer agreements on the basis of the applications which contained material misrepresentations. The written Volkswagen and Audi dealer agreements, which governed the relationship between Coast and Volkswagen and Audi, respectively, required all dealers to maintain compliance with certain financial requirements including the maintenance of separate wholesale lines of credit for the purchase of new vehicles in accordance with established vehicle drafting procedures. The dealer agreements also provided that VWoA and Audi had the right to terminate the agreement if there were material misrepresentations as to any fact relied upon in entering into the agreements.

Coast maintained the required wholesale lines of credit for the purchase of its new motor vehicle inventory until December 1995. At that time, its wholesale (or floor plan) finance company, co-defendant VW Credit, Inc. ("VCI"), terminated its financial arrangements with Coast. VCI filed an action in the Superior Court of New Jersey, Law Division against Coast and the individual and corporate guarantors of Coast's obligations to VCI ("State Court Action"). Coast immediately filed for protection under Chapter 11 of the United States Bankruptcy Code and operated thereunder until September 18, 1997. Coast did not obtain alternate floor plan financing during its bankruptcy proceedings. Because Coast did not have a wholesale line of credit which would provide for timely replacement of the new vehicle inventory, VWoA and Audi representatives had to intervene to get new vehicles assigned to Coast, and then arrange for and confirm payment and shipment on each new vehicle. This process

both delayed and reduced the allocation of new vehicles to Coast. (Pet. App. 7a).

The parallel State Court Action ultimately included a Third-party Complaint against VWoA and Audi. The claims in that action included statutory causes of action under the NJFPA and the Dealer's Act identical to those which were the subject of the jury trial in the federal action in addition to common law causes of action. In 1999, VWoA and Audi sought to terminate Coast's franchises on the basis that it failed to maintain the required wholesale lines of credit for the purchase of new vehicles but the state trial court preliminarily enjoined the termination. In 2000, Coast and the proposed transferee of Coast's Volkswagen and Audi franchises added claims in the State Court Action under the NJFPA and common law against VWoA and Audi in connection with VWoA's and Audi's disapproval of the transfer of the franchises. In June, 2001, over the objection of VWoA and Audi and prior to the trial of all claims pending in the State Court Action, the state trial court entered an Order conditionally approving Aspen Knolls as the franchise transferee of Coast's Volkswagen and Audi franchises. That Order was determined to be final for the purposes of appeal. The Superior Court of New Jersey, Appellate Division, affirmed the Order and issued its Opinion on the appeal of this limited order in *VW Credit, Inc. v. Coast Automotive Group, Ltd.*, 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002).

## SUMMARY OF THE ARGUMENT

Coast urges this Court to grant its petition to review the decision of the Third Circuit Court of Appeals in affirming the jury verdicts entered in favor of VWoA and Audi on statutory causes of action under the NJFPA and the Dealer's Act.

Coast claims error in allowing the jury to receive instructions and a verdict sheet question on the statutory defense provided to franchisors in the NJFPA. The Court of Appeals for the Third Circuit recognized the unambiguous statutory language in the NJFPA which provides a defense to franchisors in "any action brought under the Act" (NJFPA). No New Jersey state court has construed this statutory language. The interpretation of the plain language of the state statute by the lower federal courts is reasonable in light of the statutory text and the policies that the New Jersey legislature was pursuing in enacting the NJFPA. Further, the statutory language and accompanying legislative history is not reasonably susceptible to the contrived interpretations of the limited applicability of the statute urged by Coast.

Coast also tries to conjure up an inconsistency between the Third Circuit decision and the state appellate court opinion in *VW Credit, Inc. v. Coast Automotive Group, Ltd.*, 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002) where none exists. The state appellate court decision recognized Coast's rights as a franchisee under the NJFPA, in particular its right to transfer its franchises to a third party during the pendency of the parallel State Court Action, where a preliminary injunction against termination had issued. There is nothing in the state court decision which either explicitly

discusses or could reasonably be interpreted to eliminate the statutory defense provided under the state statute or otherwise alter the rights of franchisees and franchisors under the NJFPA at a subsequent trial on the merits.

Finally, Coast's position that the jury verdicts on the state and federal statutory claims are against the substantial and credible weight of the evidence is neither supported by the record nor appropriately the subject of a Petition to this Court. The consideration of the sustainability of the jury verdicts would require this court to inquire of the particular facts adduced at the trial in this case. Any such fact-bound review would have little, if any, universal application to other cases.

## REASONS FOR DENYING THE PETITION

### I. COAST HAS FAILED TO PRESENT ANY SOUND REASON FOR GRANTING THE PETITION BASED UPON THE THIRD CIRCUIT'S INTERPRETATION OF THE UNAMBIGUOUS STATUTORY DEFENSE PROVIDED TO FRANCHISORS IN THE NEW JERSEY FRANCHISE PRACTICES ACT, N.J. STAT. ANN. 56:10-1, *ET SEQ.* (WEST 2001) ("NJFPA").

Through its Petition, Coast complains of legal error in the jury instructions and verdict sheet question which were based upon the express defense provided to franchisors to "any action" brought against a franchisor under the NJFPA by its franchisee. (Pet. at 13-18, Legal Argument II.) VWoA and Audi submit that the lower federal courts appropriately sanctioned the plain meaning of the terms employed by the State Legislature in providing franchisors with a complete defense to any action under the NJFPA

where the complaining franchisee is not in substantial compliance with its franchise obligations. *See*, N.J. Stat. Ann. 56:10-9 (West 2001).

Coast alleged a violation of the NJFPA by VWoA and Audi in connection with the allocation of motor vehicles to Coast's dealership during its bankruptcy proceedings. (Pet. App. 30a Jury Verdict Sheet Question 5.) Although the jury determined that VWoA and Audi violated the NJFPA in the allocation of vehicles to Coast, it denied Coast the right to recover under the NJFPA on the basis of VWoA's and Audi's proof that Coast failed to substantially comply with its requirements under the franchise agreement. (Pet. App. 30a.) Thus, Coast's claim under the NJFPA was defeated on the basis of the statutory defense provided to franchisors in N.J. Stat. Ann. 56:10-9 (West 2001). (Pet. App. 30a, Verdict Sheet Question 6.) That section provides:

> It shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it can be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise and other agreements ancillary or collateral thereto.

As stated in its opinion in this case, the Third Circuit Court of Appeals and federal District Courts had previously recognized that N.J. Stat. Ann. 56:10-9 (West 2001) serves as a complete defense to actions under the NJFPA. *See*, Pet. App. 13a, citing *GMC v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 321, n.11 (3d Cir. 2001); *In re The Matterhorn Group, Inc.*, Nos. 97B 41274-97B 41278, 2002 Bankr. Lexis 1275 (Bankr. S.D.N.Y. 11/15/02); *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F. Supp. 276, 286 (S.D.N.Y. 1991). The Third Circuit further acknowledged, however, that there are no New Jersey state court cases which involve the

application of the statutory defense to affirmative claims by a franchisee under the NJFPA. (Pet. App. 11a.) Although more fully addressed in Section II below, Coast's suggestion that the availability of the statutory defense in this case is inconsistent with the New Jersey Appellate Division in *VW Credit, Inc. v. Coast Automotive Group, et als.*, 787 A.2d 951 (N.J. Super. App. Div.), *cert. denied*, 796 A.2d 895 (N.J. 2002), is seriously misleading since there is no mention of N.J. Stat. Ann. 56:10-9 (West 2001) in that case.

In the absence of controlling state law precedent, the District Court (and the Third Circuit) in this case gave the terms in the New Jersey statute their normal meaning and, accordingly, allowed the jury to be instructed on the availability of the defense to the claims under the NJFPA. As such, considering the state statutory language, the Third Circuit noted that:

> New Jersey abides by well-known rules of statutory construction. In New Jersey, when a statute is clear and unambiguous on its face, 'the sole function of the courts is to enforce it according to its terms.' *Velazquez v. Jiminez*, 798 A.2d 51, 61 (2002). 'All terms in the statute should be accorded their normal sense and significance.' *Id.* The 'overriding objective in determining the meaning of the statute is to effectuate the legislative intent in light of the language used and the objective sought to be achieved.' *McCann v. Clerk of the City of Jersey City*, 771 A.2d 1123, 1128 (N.J. 2001) (quoting *State v. Hoffman*, 695 A.2d 236, 243 (N.J. 1997)). . . .
>
> Giving these terms their normal meaning, as we must, we find no support for Coast's contention that the statutory defense does not apply to actions

> brought under Section 56:10-7(e). To the contrary, Section 56:10-9 provides a complete defense to a franchisor in 'any action' brought under the NJFPA where the franchisee has itself committed a material breach of the franchise agreement. (Pet. App. 11a-12a.)

In its analysis, the Third Circuit noted that the "plain meaning of 56:10-9 is consistent with the NJFPA's stated legislative policy of regulating the responsibilities of both the franchisee and the franchisor." (Pet. App. 12a.) The legislative statement accompanying the bill in the New Jersey Assembly acknowledged that other States had adopted legislation defining the protections afforded both parties to a franchise agreement and further indicated:

> New Jersey would do the same in this bill which, through the courts, would rule out arbitrary and capricious cancellation of franchises while preserving the right of franchisors to safeguard their interests through the application of clear and nondiscriminatory standards . . .

*See, Westfield Centre Service, Inc. v. Cities Service Oil Company*, 432 A.2d 48, 54 (N.J. 1981) (citing Statement Accompanying Assembly Bill 2063 (1971)).

In discussing the various state legislation concerning franchise relationships, the Supreme Court of New Jersey recognized:

> . . . the limited reach of such statutes. These laws are designed to provide relief only to innocent franchisees, those who had complied with the terms of their franchise agreement but nonetheless were victimized by the loss of their franchises.

*See, Dunkin' Donuts of America, Inc. v. Middletown Donut Corp.*, 495 A.2d 66, 71 (N.J. 1985).[1] In that case, the New Jersey's highest court went on to acknowledge that "the statute, however, is not designed to protect those franchisees who willfully violate the terms of their agreements." *Id.*, 495 A.2d at 72, citing *Amerada Hess Corp. v. Quinn*, 362 A.2d 1258 (N.J. Super. Law Div. 1976). Thus, the New Jersey courts have recognized that an affirmative cause of action does not exist for the benefit of a franchisee where the franchisee itself is in breach of its obligation. In light of the express statutory language utilized in N.J. Stat. Ann. 56:10-9 (West 2001) and the statements of the New Jersey Supreme Court in other cases, it is reasonable to conclude that a franchisee's substantial non-compliance is a defense to a franchisor.

Irrespective of these compelling reasons for sanctioning the interpretation of the statutory language afforded by the lower federal courts in this case, Coast contends in its Petition (as it did below) that the defense should not apply in this case. Coast essentially argues that the defense (1) is not applicable to "non-termination" cases (such as its claim under N.J. Stat. Ann. 56:10-7(e) (West 2001)) and (2) must bear a factual relationship to the franchisee's affirmative claims against the franchisor. (*See* Pet. at pp. 16-17.) Given the absence of New Jersey state court cases addressing the application and scope of N.J. Stat. Ann. 56:10-9 (West 2001), Coast cannot cite state law

[1] Coast's complaint that the Third Circuit misconstrued the concept of "innocent franchisee" is without merit. (*See* Pet. at p.12.) Clearly the New Jersey Supreme Court recognized the term as appropriate for franchisees who had not complied with their obligations under the franchise agreements.

precedent for these arguments. VWoA and Audi maintain that the Third Circuit's disposition of the issue concerning the statutory defense being reasonable, this Court's consideration of the issue should end here. *See*, *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional circumstances, the considered determination of questions of state law by the intermediate federal appellate courts."). For the purpose of completeness, however, VWoA and Audi will explore the arguments further.

Coast is correct in its indication that the citations by the Third Circuit in its decision are to cases dealing with terminations of a franchise. (*See* Pet. at 11.) It is significant to note that the language in Section 56:10-5, the "termination" provision in the NJFPA, mirrors the language in the statutory defense provision of the statute, Section 56:10-9. Pursuant to N.J. Stat. Ann. 56:10-5 (West 2001), a franchisor may lawfully (*i.e.* not in violation of the NJFPA) terminate a franchisee for "good cause" which is defined as the failure by the franchisee to substantially comply with the requirements imposed by the franchise. Given that the definition of "good cause" for termination is identical to the language utilized by the Legislature to describe the defense provided to franchisors in Section 56:10-9, it would be unnecessary to include Section 56:10-9 if its application was limited to cases involving the "termination" of franchises. Further, the language in Section 56:10-9 that "it shall be a defense for a franchisor to *any action* brought under this act . . . " anticipates a broader application than a defense to a termination case as there are other bases for claims against a franchisor under the NJFPA.

In alleging that VWoA and Audi unfairly allocated vehicles to it during its bankruptcy proceeding, Coast's particular NJFPA claim was couched under the act's prohibition against the imposition of unreasonable standards of performance which is proscribed in N.J. Stat. Ann. 56:10-7(e) (West 2001). As stated by Coast, a New Jersey District Court decision indicates that Section 56:10-7(e) "can be read as a codification of a franchisor's responsibility to comply with the covenant of good faith and fair dealing." (*See* Pet. at 14, citing *Carlo C. Gelardi v. Miller Brewing Co.*, 502 F. Supp. 637, 653 (D.N.J. 1980)). Coast asserts that the obligation to perform a contract in good faith is inconsistent with the statutory defense and the attendant jury instructions and verdict sheet question. (*See* Pet. at 14-16.) Again, there is no precise New Jersey case dealing with this issue. However, it is not disputed that the district court gave the jury accurate instructions relative to the duty of good faith and fair dealing in addition to identifying the specific contract provisions which relate to both Coast's affirmative claim and VWoA's and Audi's defenses. Further, the New Jersey Supreme Court has addressed the appropriateness of a verdict sheet question involving the application of the implied duty of good faith and fair dealing to the alleged breach of a literal term of a contract. *See*, *Wade v. Kessler Institute*, 798 A.2d 1251, 1262 (N.J. 2002). The court concluded that the two claims reflected "one and the same alleged breach." *Id.* In that case, the court determined that the issue of the implied covenant should not have been included in a separate interrogatory to the jury as the jury should have resolved the question of whether there was a breach of a contract provision as "a literal term" not a violation of the implied covenant. *See*, *id.*

The Third Circuit was not persuaded by the argument that Section 56:10-9 is inconsistent with the duty of good faith and fair dealing and a cause of action under 56:10-7(e). (Pet. App. 13a.). It recognized that the defense does not circumvent the State Legislature's intended purpose in enacting the NJFPA to protect innocent (non-breaching) franchises. (Pet. App. 13a.)

Coast also suggests that the lower courts committed error in their failure to require "a factual relationship between Coast's affirmative allocation claim decided in Coast's favor and the purported substantial noncompliance alleged by VWoA and Audi as a defense to that affirmative claim." (Pet. at 16.) Clearly, the New Jersey Legislature did not include such additional terms or conditions in the NJFPA and Coast points to no basis in the legislative history or case law for the same. The addition of conditions to the availability of a defense is not consistent with the legislative policies of defining the rights and responsibility of both parties to the franchise agreement and providing relief to franchisees not in breach of their obligations.

For all of these reasons, VWoA and Audi submit that the Third Circuit (and the Federal District Court) soundly and reasonably addressed the state law statutory interpretation issue raised by Coast in its Petition. The unambiguous language employed by the New Jersey Legislature in granting a defense to franchisors to actions against them under the NJFPA was enforced by the lower federal courts as written. The limiting conditions sought to be imposed by Coast are more appropriately addressed in the form of a State legislative amendment. In the absence of an articulated extraordinary basis for reviewing the lower court's application of state law, VWoA and Audi submit that it is

appropriate to deny Coast's Petition for Certiorari on this basis. *See*, *Haring v. Prosise*, 462 U.S. 306, 314, n.8 (1983).

## II. THE DECISION OF THE THIRD CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION IN *VW CREDIT V. COAST*, 787 A.2D 951 (N.J. SUPER. APP. DIV.), *CERT. DENIED*, 796 A.2D 895 (N.J. 2002) WHEREIN THE STATE APPELLATE COURT PERMITTED COAST TO TRANSFER ITS FRANCHISES TO A THIRD PARTY DURING THE PENDENCY OF PARALLEL STATE COURT PROCEEDINGS.

In legal arguments I and III of its Petition, Coast argues that the Third Circuit improperly disregarded the precedent of *VW Credit, Inc. v. Coast*, *supra*, in which the state appellate court afforded Coast relief under the NJFPA. Coast seriously mischaracterizes the issues presented to the state appellate court and the legal effect of the decision. Coast attempts to provide a basis for this Court to grant its Petition for the purpose of correcting an alleged conflict between a state appellate decision and that of the Third Circuit where none exists.

In the parallel State Court Action, the trial court had preliminarily enjoined the termination of Coast's Volkswagen and Audi franchises. The state trial court subsequently determined that Coast had the right under the NJFPA to transfer its franchises to a third party and that VWoA and Audi unreasonably withheld their approval to the proposed transfer. The order conditionally approving the transfer was declared final and was appealed prior to a trial on the merits of all claims by and between Coast and VWoA and Audi. On appeal, the Superior Court of New

Jersey, Appellate Division, rendered the subject decision on the "primary issue" concerning "the refusal of a franchisor to consent to the franchisee's transfer of the franchises, N.J. Stat. Ann. 56:10-6 (West 2001), and the consequences when that consent is found by a court to be unreasonably withheld." *VW Credit, Inc. v. Coast*, 787 A.2d at 953 (N.J. Super. App. Div.). The Appellate Division concluded that the NJFPA, in particular, N.J. Stat. Ann. 56:10-6 (West 2001), contemplates that the remedy of specific performance is available to compel the transfer. *See, id.*

### A. The State Appellate Court's Recognition of Coast as a Franchisee with Rights Under NJFPA Does Not Operate to Eliminate the Statutory Defense Available to Franchisors.

It is not reasonable to extrapolate the unavailability of the statutory defense to VWoA and Audi based upon the state appellate court's recognition of Coast's rights as a franchisee under the NJFPA. For the purpose of this Court's consideration of the within Petition, it must be emphasized that the decision did not include any reference to the statutory defense set forth in N.J. Stat. Ann. 56:10-9 (West 2001). Further, the decision was rendered prior to a final determination on the merits of VWoA's and Audi's defense to the claims against them under the NJFPA that Coast had failed to substantially comply with its obligations under the franchise agreement. It was in this context that the state appellate court recognized Coast's rights under the NJFPA and concluded:

> Under the circumstances, the preliminary injunction entered was appropriate, reasonable, and within the authority of the court to issue.

> *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 86 N.J. 453, 466-67, 432 A.2d 48 (1981) (trial court may issue temporary injunctive relief or restraints (1) to maintain the status quo during litigation, (2) to provide a franchisee with some additional time to wind up or move its business, or (3) for any other equitable purpose).
>
> The termination having been enjoined, Coast remained the franchisee with all of its rights governed by the Act, including the right to transfer under Section 6 of the Act.

*VW Credit v. Coast, supra*, 787 A.2d at 957. Contrary to the implication in Coast's Petition, the state appellate court's recognition of Coast as a franchisee with the right to transfer its franchises under the NJFPA does not translate into the unavailability of the statutory defense to franchisors at the time of a final adjudication on the merits of a claim under the state statute.

The state appellate decision dealt with a very restricted topic – the right of a franchisee to transfer its franchises and the appropriate remedy where a franchisor unreasonably withholds consent to the franchise. VWoA and Audi had argued that specific performance (or an order approving a franchise transfer) was not appropriate but that damages (under N.J. Stat. Ann. 56:10-10 (West 2001)) would be appropriate for any violation relative to the withholding of consent. The Appellate Division concluded to the contrary, however, and applied the general principle of statutory construction that "when two statutes conflict, the more specific controls over the more general." *Id.*, 787 A.2d at 961. Specifically, the court concluded that the "particular statutory provisions of Section 6 (56:10-6) requiring specific performance for a violation of that

section, trump the general provisions of damages available under Section 10 (56:10-10)." *Id.* The court reasoned that such reading would effectuate the legislative intent as "Section 6 contemplates the transfer and continuation of the franchise . . . " and a "damage award would not accomplish that objective." *Id.* The state appellate decision has no impact on the Third Circuit's analysis of the availability of the statutory defense to a franchisee's subsequent claim for damages on a separate cause of action for an alleged violation of the NJFPA.

### B. The State Appellate Court's Finding in the Context of a Preliminary Injunction That Coast Was Not in Material Breach Does Not Constitute a Final and Binding Adjudication on the Merits.

Coast also takes the position that the state appellate court held "as a matter of law" that "Coast's buying cars with the equivalent of C.O.D. is not a material breach of its obligation" and, thus, one (of the two) basis for VWoA's and Audi's defense to the NJFPA claim was not properly presented to the jury. (*See* Pet. at 18.) This position represents a blatant misstatement of the state appellate decision. VWoA and Audi had sought to terminate Coast's franchises in 1999 on the basis of its failure to maintain the required wholesale lines of credit for the purchase of new motor vehicle inventory but the state court *preliminarily* enjoined the termination attempt. In the *VW Credit v. Coast* case, the Appellate Division acknowledged the validity of the trial court's grant of a preliminary injunction against termination during the pendency of the state court proceedings. In doing so, the appellate court noted:

> This is not a case where a franchisee was in substantial breach of its obligations under the franchise agreements, *which would prohibit a preliminary injunction against termination. See, VW Credit v. Coast*, 787 A.2d at 957. (Citations omitted.) (Emphasis added.)

In making the argument to this Court regarding the legal effect of the state appellate court's determination that Coast's method of paying for motor vehicles was not a substantial breach, Coast omits the complete statement by the appellate court as set forth above. The court clearly indicates that the determination was made in accordance with the standards for granting a preliminary injunction. As this Court is aware, the standards for granting a preliminary injunction include a showing that Coast demonstrated a reasonable probability (or likelihood) of eventual success on the merits of its claim that it was in substantial compliance with its obligations under the franchise agreements. *See, id.* 787 A.2d at 956. This is not identical to a final determination or actual success on the merits. *See, Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987). The Third Circuit accepted this fundamental principle in stating that the court agreed:

> with VOA/AOA that the *New Jersey Superior Court's statement in the context of a preliminary injunction proceeding has no bearing on the facts adduced at trial on this case* and we find that there is sufficient evidence supporting VOA/AOA's theory that Coast breached the franchise agreement by failing to maintain an adequate floor plan for purchasing new vehicles. (Emphasis added.)

(Pet. App. at 14a-15a.)

VWoA and Audi maintain that there is no sound legal basis for Coast's further statement that "until the Appellate Division or Supreme Court changes or modifies the holding in the *VW Credit v. Coast* (state court) appeal, buying motor vehicles on C.O.D. or its equivalent is substantially compliant" outside of the context of a preliminary injunction. (*See* Pet. at 19.) That being true, VWoA and Audi dispute any legal error in the Third Circuit decision affirming the portion of the jury verdict that Coast failed to substantially comply with its franchise obligations based on an alleged conflict with the state appellate court decision.

In any event, as discussed briefly in Section III below, VWoA and Audi relied upon two separate factual bases in their defense of the NJFPA claim. In addition to the allegation that Coast was not in compliance with its franchise agreements by failing to maintain the required wholesale lines of credit, VWoA and Audi also alleged that Coast made material misrepresentations in the applications submitted to become a Volkswagen and Audi dealer in the first instance. In the bench opinion, the District Court determined that Coast made material misrepresentations in the applications. (Supp. Pet. App. 19a.) Either of these factual bases for VWoA's and Audi's defense is sufficient to support the jury verdict. (Pet. App. 14a.)

## III. THE JURY VERDICTS IN FAVOR OF VWOA AND AUDI ON THE TWO STATUTORY CLAIMS ARE SUPPORTED BY THE SUBSTANTIAL AND CREDIBLE WEIGHT OF THE EVIDENCE AND, IN ANY EVENT, NOT OF SUFFICIENT UNIVERSAL IMPORTANCE TO WARRANT REVIEW BY THIS COURT.

Through arguments IV and V of its Petition, Coast submits that the jury's verdict on the two statutory claims is against a substantial and credible weight of the evidence. A petition for a writ of certiorari will only be granted for compelling reasons. Supreme Court Rule 10. Where the "asserted error consists of erroneous factual findings" a petition is rarely granted. *Id.* Coast has not presented any compelling reason for this Court to exercise its discretionary jurisdiction. Indeed, the sufficiency of the evidence presented to the jury on both statutory claims was squarely addressed and affirmed by the Third Circuit.

### A. Sufficient Evidence Was Presented to Support the Verdict In Favor of VWoA and Audi on the NJFPA Claim.

In argument IV of its Petition, Coast asserts that the jury's determination that Coast was not in substantial compliance with its obligations under the Volkswagen and Audi franchise agreements was erroneous. This is the Verdict Sheet Question which addresses the statutory defense provided to franchisors in N.J. Stat. Ann. 56:10-9 (West 2001) and discussed in argument I hereof. (Pet. App. 30a, Verdict Sheet Question 6.) At trial, VWoA and Audi contended that Coast failed to substantially comply with its obligations on two separate bases. First, Coast failed to maintain the financial accommodations for the purchase of

new vehicles (i.e. floor plan or wholesale financing). Secondly, VWoA and Audi alleged that Coast made material misrepresentations in the applications to be awarded the Volkswagen and Audi franchise agreements in the first instance. "Jury question 6 did not require the jury to specify which one of the two bases for the defense they relied on." (Pet. App. 14a.) The Third Circuit noted that they (jury) "need only find the evidence sufficient as to one of the proffered bases." *Id.*

"Substantiality" of compliance with one's franchise obligations is not defined in the NJFPA. As correctly noted by Coast, mere technical defects or omissions by a franchisee are insufficient. (Pet. App. at 22.) The Third Circuit agreed with the position of VWoA and Audi that guidance for determining the "substantiality" of the franchise requirements can be gleaned from N.J. Stat. Ann. 56:10-6 (West 2001), the section which addresses applications for transfers of a franchise. (Pet. App. 14a-15a.)

> Under Section 56:10-6, a franchisor may reject a dealership's application to transfer a franchise based on lack of financial ability of the prospective transferee. As in transfer of dealership cases, the prospective franchisee's financial ability is a key factor in the franchisor's decision to grant a dealership in the first instance. Insuring that a prospective dealer has the necessary financial resources to make the franchise succeed ultimately protects the trade name, image, and good will of the franchisor. *See*, *Amerada Hess Corp. v. Quinn*, 362 A.2d 1258, 1266, N.J. Super. Law Div. 1976) (defining substantiality of noncompliance in terms of its effect or potential effect on the franchisor's trademark, trade name, image, and good will).

(Pet. App. 15a.) As further indicated in the *Amerada Hess Corp.* case,

> A franchisor has interest in a particular franchisee's performance broader than the mere protection and enhancement of its trade name, trademark and the good will attached thereto. . . . The franchisor also has an interest in the marketing of its products . . . through the franchise, and a franchisee's breach of his reasonable obligations thereunder, proved to have adversely impacted the volume of the franchisor's goods sold through the franchisee, would substantially impair that interest so as to justify termination.

*Id.*, 362 A.2d at 1266. Clearly, insufficient financial resources have an impact on the volume of a franchisor's goods sold and ultimately negatively impact upon a franchisor. Both grounds for VWoA's and Audi's defense involve the financial requirements for all Volkswagen and Audi dealers. VWoA and Audi rely upon the brief discussion of the particular facts in this case as stated by the Third Circuit in its Opinion (Pet. App. 7a-8a & 14a-16a) and the District Court Opinion relative to its decision on the Counterclaim. (Supp. Pet. App. 6a-14a.)

The Third Circuit concluded that there was sufficient evidence that Coast breached the franchise agreement by failing to maintain an adequate floor plan for purchasing new vehicles. (Pet. App. 15a.) The Third Circuit recognized that:

> Because Coast did not have a wholesale line of credit which would provide for timely replacement of the new vehicle inventory, however, VOA/AOA representatives had to intervene to get more vehicles assigned to Coast, and then arrange

> for and confirm payment and shipment on each new vehicle. This process both delayed and reduced the allocation of new vehicles to Coast.

(Pet. App. 7a.) As discussed in argument II, *supra*, the Court also rejected Coast's contention that the state appellate court's statement concerning the substantiality of Coast's breach for failure to maintain its wholesale line of credit "in the context of a preliminary injunction proceeding" as it had "no bearing on the facts adduced at trial in this case." (Pet. App. 14a-15a.)

In the alternative, the Third Circuit also concluded that "the evidence is sufficient to support the verdict based on Coast's substantial noncompliance in materially misrepresenting its financial ability in the dealer applications." (Pet. App. 15a.) In its Petition, Coast contends that the misrepresentations are a technical breach. (Pet. at 25.) VWoA and Audi submit that the express determination by the District Court (in its unappealed bench decision) that Coast made material misrepresentations should not be subject to collateral attack.

Coast further argues that the latter breach would only be relative to the 1991 dealer application and therefore not applicable to the subsequent dealer agreements issued by VWoA and Audi. (Pet. at 25-27.) Coast suggests that the subsequent dealer agreements do not "relate back to Coast's original application" to be appointed a Volkswagen and Audi dealer. Coast ignores a fundamental principle recognized by the Supreme Court of New Jersey that "with the advent of the New Jersey Franchise Practices Act, once a franchise relationship begins, all that a franchisee must do is comply substantially with the terms of the agreement, in return for which he receives the benefit of an 'infinite' franchise – *he cannot be* terminated or *refused*

*renewal." Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., supra,* 495 A.2d at 76. Thus, renewal of a dealer agreement is virtually guaranteed where a dealer substantially complies with his franchise obligations (unless the franchisor compensates the franchisee for the value of the franchise). Coast suggests that it should be able to make material misrepresentations to obtain its franchise agreement in the first instance and thus gain the benefit of "infinite" franchise so long as the franchisor does not discover the same until after the issuance of any renewal agreement. (*See* Pet. at 25-28.) This argument runs counter to common sense and the goal of the NJFPA to protect "innocent franchisees." *See id.* 495 A.2d at 73.

VWoA and Audi submit that sufficient credible evidence supports the jury's verdict on the NJFPA claim and, in any event, no compelling reason has been cited to warrant grant of the Petition on this basis.

### B. The Jury's Verdict In Favor of VWoA and Audi on the Dealer's Act Claim Was Supported by Credible Evidence and Not In Error.

In its final argument in Section V, Coast maintains that the jury's verdict on the Dealer's Act claim was against the weight of the evidence and inconsistent with its determination under the NJFPA. (Pet. at 28-30.) On the Dealer's Act claim, the jury specifically concluded that Coast did not prove that VWoA's and Audi's "conduct was an attempt to coerce or intimidate plaintiff into surrendering or selling its Volkswagen and Audi franchises." (Pet. App. 29a, Verdict Sheet Question 2.)

In support of its position, Coast reiterates the misleading statement that "the jury clearly found that VWoA's and Audi's actions were an attempt to drive Coast out of business." (Pet. at 29.) Upon close inspection of the jury verdict sheet, however, it is clear that the jury was not required to make such a "finding." (Pet. App. 28a-30a.) Coast apparently relies upon a portion of the jury instructions on the NJFPA claim wherein it was recognized that a franchisor is prohibited from attempting to drive a franchisee out of business (Pet. App. 55a). The jury determination under the separate NJFPA claim that VWoA and Audi "violated the NJFPA in their allocation of vehicles to plaintiff" (Pet. App. 30a, Verdict Sheet Question 5) does not equate with a finding under the Dealer's Act that VWoA's and Audi's actions were an attempt to coerce or intimidate Coast into surrendering or selling (its franchises) under the federal Act. The prerequisites for a cause of action under each statute are distinct.

The Dealer's Act ascribes specific meanings to the terms "coercion" and "intimidation". *See*, 15 U.S.C. §1221(e) and §1222 (West 1998). The federal Act does not protect dealers against all unfair practices, but only against those breaches of good faith evidenced by acts of coercion or intimidation. *See*, *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 93 (3d Cir. 2000), citing *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 573 (10th Cir. 1975). In those cases where a Dealer's Act violation was established and allocation of vehicles was involved, evidence of the requisite intimidation or coercion was present. For example, the receipt of the diminished or wrongful allocation or a refusal to accept orders for certain vehicles in order to force a dealer to comply with a *wrongful* demand may constitute a violation of the Dealer's Act.

*See, David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 55-56 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (evidence showed that dealer which refused to handle a second line of vehicles being sold by the manufacturer suffered a greater reduction in the number of motor vehicles delivered to it in an attempt to compel the dealer to accept the second line of vehicles); *American Motors Sales Corp. v. Semke*, 384 F.2d 192, 197 (10th Cir. 1967) (evidence that manufacturer refused to supply a dealer with vehicles unless the dealer ordered unwanted models); and *Gregoris Motors v. Nissan Motor Corp.*, 630 F. Supp. 902, 912 (E.D.N.Y. 1986) (misallocation and late delivery paired with a demand for extra illegal consideration for popular cars was sufficient to state a cause of action).

These types of coercive or "either or proposition" factors are not present in this case. The only "evidence" of alleged coercion and intimidation cited by Coast is oral testimony of its dealer principal and employees that Volkswagen's representative indicated that Coast was not going to get any more vehicles and that VWoA pressured Coast to sell back its franchises in addition to a Bankruptcy Court Order appointing a Chapter 11 Trustee to liquidate Coast's dealership. In fact, testimony was presented by the VWoA representative that he never threatened or coerced Coast to sell or surrender its franchise. Additionally, VWoA and Audi were not involved in the entry of the Bankruptcy Court Order requiring liquidation. The Third Circuit recognized that "although Coast asserts that it was VWoA and Audi that pressured it into selling its franchise, Coast represented in bankruptcy proceedings that *its inability* to maintain adequate floor plan financing caused it to conclude that it had to sell the

dealership." (Pet. App. 16a-17a.) VWoA and Audi submit that sufficient credible evidence supports the jury's verdict on the Dealer's Act claim and, in any event, Coast has cited no compelling reason to warrant review of the factual findings by this Court.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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DATED: July 26, 2005